Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

IN RE: CONDEMNATION BY THE REDEVELOPMENT AUTHORITY OF THE CITY OF ALLENTOWN OF 235 NORTH FIFTH STREET, CITY OF ALLENTOWN, LEHIGH COUNTY, PENNSYLVANIA, JOE LARRY THORPE (CONDEMNEE), LINDA D. THORPE (CONDEMNEE),

JOE L. THORPE AND LINDA D. THORPE,

Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

As presented in this brief, the Pennsylvania courts have misinterpreted Supreme Court cases in establishing eminent domain guidelines and providing owners of property due process prior to the property's condemnation and destruction by local officials. By not giving the Petitioners opportunity to conduct discovery and obtain concrete evidence regarding the Authority's, City's and Hospital's plans undercuts the Petitioners' constitutional right of due process. By not giving the Petitioners' opportunity to defend their property interests as the "owner of record", local officials devalued the Petitioners' interest in the property and violated the "owners" due process clause of the United States Constitution. If this Honorable Court denies this writ for certiorari, then the Pennsylvania's Supreme Court's opinion is upheld, proper due process in protecting a person's property interest has been diminished.

The Petitioners' case should have never been dismissed since they were denied the opportunity to pursue their case before a jury. However, the state courts failed to give the Petitioners the opportunity to perform discovery, because they allege that that the statute mandated a quick resolution of the eminent domain. Such an interpretation is a violation of the Petitioners' constitutional rights.

I. Whether The Pennsylvania Supreme Court Erred In Denying The Petitioners' Preliminary Objections And Allowing The Taking Of The Petitioners' Property Because The State Courts Weighed Imminent Taking Of The Property Over The Petitioners' Right Of A Jury Trial And Due Process In Violation Of The United States Constitution?

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The decision of the Supreme Court of Pennsylvania dated August 30, 2000 is set forth in the Appendix, p. 1a. The opinion of the Court of Common Pleas of Lehigh County, Pennsylvania dated June 1, 1999 is set forth in the Appendix, p. 2a-33a. The order of the Commonwealth Court of Pennsylvania dated December 21, 1999 is set forth in the Appendix, p. 34a.

STATEMENT OF THE BASIS OF JURISDICTION OF THE SUPREME COURT

The statutory provision for this Court's jurisdiction is 28 U.S.C. Section 1254. The Supreme Court of Pennsylvania denied the Petitioner's Petition for Allowance of Appeal on August 30, 2000. This Petition was timely filed within the appeal period.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED IN THIS CASE

CONSTITUTIONAL PROVISIONS

Seventh Amendment, United States Constitution:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and not fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of common law.

Fourteenth Amendment, United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATE LAW

Eminent Domain Code – 26 P.S. Section 1-406

> ...(e) The court shall determine promptly all preliminary objections and make such preliminary and final orders and decrees as justice shall require, including the revesting of title.

STATEMENT OF THE CASE

Joe L. Thorpe and Linda D. Thorpe, the Petitioners, were served a Declaration of Taking of Property by the Redevelopment Authority of the City of Allentown, Pennsylvania, the "Authority", on January 28, 1999.

The purpose of the taking must be explained. In 1973, the Scared Heart Hospital (the "Hospital") a Roman Catholic Hospital, wanted to expand its facilities. In 1995, the City of Allentown, (the "City"), obtained a federal grant, and later a state grant, to allow the Hospital to build a facility on the land that the Hospital had purchased and also to buy remaining properties in the area, including the Petitioners' property.[1] Commencing in 1996, the Hospital threatened the Petitioners that they would seek eminent domain from the City if the Petitioners did not sell their property at a price much lower than offers given to neighboring properties. In July of 1997, the Hospital asked the Authority to take the Petitioners' property by eminent domain, since the Petitioners failed to agree to the devalued price the Authority refused. In November of 1997, after Petitioners refused to pay extortion to the Hospital's agent., the Hospital agreed in writing to pay the Authority $300,000.00 to take the Petitioners' property. As a result, several months later in February, 1998, the City condemned Petitioners property and 79

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1 It is important to note that the federal and state grants were obtained by fraudulent misrepresentations and were under criminal investigation by the federal government prior to filing of the taking by the Authority.

acres of land surrounding the Petitioners' property based on minor code violations. The only plan approved by the City was to remove the Petitioners' building.

In March of 1999, the Hospital completed a new building on the land adjacent to the Petitioners' property. The Hospital and the City agreed by city ordinance to let the Petitioners' building alone because it was not needed for the project. In a scheme to defraud Petitioners, they changed their minds and sued for the Petitioners' property for alleged parking usage, even though they certified to the federal and state grant agencies that there was already sufficient parking for the Church Hospital.

As a result, on January 28, 1999 the Authority filed a notice of taking of Petitioners' property. On February 19, 1999, the Petitioners filed Preliminary Objections which were denied by the Court of Common Pleas.

The Petitioners' preliminary objections, and their rejection by the state courts, are the basis of this Petition for Writ of *Certiorari*.

ARGUMENT

I. THE PENNSYLVANIA SUPREME COURT ERRED IN DENYING THE PETITIONERS' PRELIMINARY OBJECTIONS AND ALLOWING THE TAKING OF THE PETITIONERS' PROPERTY BECAUSE THE STATE COURTS WEIGHED IMMINENT TAKING OF THE PROPERTY OVER THE PETITIONERS' RIGHT OF A JURY TRIAL AND DUE PROCESS IN VIOLATION OF THE UNITED STATES CONSTITUTION?

A. The Statute As Applied Per Se Is Unconstitutional Since It Violates The Petitioners' Due Process Rights.

Record owners of property are vested with property interests entitled to the procedural safeguards of due process. Failure to provide those owners with adequate notice and an opportunity to be heard renders the statutory scheme unconstitutional. The Petitioners' claim should have never been dismissed since the statute did not safeguard the Petitioners' property interests. The courts were more concerned with the definition of the word "promptly" in the eminent domain statute than seeking the true legislative intent. If promptly meant to disregard the owner's interest, the statute is unconstitutional. But, if promptly means the owner of the property has had the opportunity to conduct discovery and protect their interests, the state courts violated the Petitioners' constitutional rights.

A cornerstone of any meaningful regime of private property is the recognition that the right to use property is an inherent attribute of ownership. *See, e.g., Robert Nozick: Anarchy, State and Utopia 171* (1974) ("the central core of the notion of a property right ... is the right to determine what shall be done with it"); *United States v. Causby*, 328 U.S. 256, 261 (1946). But the Pennsylvania courts have infringed upon that right since they took away the Petitioners' property in less than three months without giving them the opportunity to defend their interests. The state statute did not give any protection to Petitioners.

It has long been held that under the federal constitution, property may not be taken for public use without reasonable notice of the proceedings authorized for its taking, and without reasonable opportunity to be heard as to substantial matters of right affected by the taking. *Hoffman*, *supra*. A state statute violates the Fourteenth Amendment if, "in some fundamental way, it infringes the fundamental rights of citizens. *Id.* at 283. In this case, there is no public purpose use. The Church Hospital paid a bribe to a public authority to take the property for the Church Hospital's private use as parking spaces.

The Due Process Clause of the Fourteenth Amendment requires that a State prior to taking an action affecting an interest in property, provide notice that is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of that action. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 195, 103 S.Ct. 2706, 2709, 77 L.Ed.2d 180 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed.

stated that the fundamental right protected by the due process clause is the right to adequate notice and an opportunity to be heard before any state action depriving one of life, liberty or property is accorded finality. Adequate notice ensures the opportunity to be heard. Thus, *Mullane* established that state action affecting property must generally be accompanied by notification of that action. *Tulsa Professional Collection Services, Inc. v. Pope*, 485 U.S. 478, 108 S.Ct. 1340, 1344 (1988). The only notice given Petitioners in this case was the threat of "city action" made by the Church Hospital.

The fundamental requisite of due process is the opportunity to be heard. Applying the fundamental principles of due process, it is readily apparent that the lower courts misapplied those basic constitutional concepts – the Petitioners were not given a reasonable opportunity to protect their property from an arbitrary or unjust appropriation. The Petitioners were denied the process to be heard, and, moreover, were denied proper notice since the Authority, City and Church Hospital were convening, demanding bribes, and accepting bribes prior to the initiation of the taking the property of the Petitioners' property. Notice was too late. The Petitioners are must be given an opportunity to be properly heard. In a society where civil actions routinely require years to resolve, a procedure whereby constitutionally protected rights are terminated in fewer than ninety days cannot be permitted.

B. By Denying The Petitioners' Right To Conduct Discovery And Properly Present Their Case Before A Jury, The Petitioners' Claims Were Improperly Dismissed.

In Pennsylvania, preliminary objections "are intended as a procedure to resolve expeditiously the factual and legal challenges to the declaration of taking before the parties proceed to determine damages. In *Appeal of Bauerle*, 674 A.2d 1204, 1207 (Pa.Cmwlth. 1996); *North Penn Water Authority v. A Certain Parcel of Land*, 168 Pa.Cmwlth. 477, 650 A.2d 1197 (1994). But even though the legal challenges must proceed accordingly, the Petitioners' constitutional rights must be upheld. Since the lower courts rejected the Petitioners' objections, their defense to their property interests were dismissed and their constitutional rights were violated.

A dismissal ought not be granted unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v Gibson*, 355 U.S. 41, 4-46 (1957). Dismissal with prejudice is a harsh sanction to be resorted to only in extreme cases and is within the court's sound discretion; court must give full regard for severity of the sanction, granting dismissal sparingly and only when less drastic alternatives have been explored. *Jones v. Smith*, 99 F.R.D. 4 (1983). A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *Conley v. Gibson*, 355 U.S. 41, 2 L.Ed.2d 80, 78 S.Ct. 99 (1957); *Melo-Sonic Corporation v. Crop*, 342 F.2d 856 (3rd Cir. 1965). A summary judgment motion is appropriate when there is no

genuine issue of material fact. *Anderson v. Liberty Lobby, Inc*, 477 U.S. 242, 252, 106 S.Ct. 2505 (1986) A dispute is "genuine" if the evidence is such that a reasonable jury could return a verdict for the nonmoving party. *Id.* A fact is "material" if a dispute over it might affect the outcome of the suit under the governing law. *Id.* No matter how likely it may seem that a pleader will be unable to prove his case, he is entitled, upon averring claim, an opportunity to prove his case, and complaint is not subject to dismissal unless it appears to certainty that Plaintiff cannot possibly be entitled to relief under any set of facts which could be proved in support of its allegations. *Pointer v. American Oil Co.*, 295 F.Supp.573 (1968). Courts may not dismiss complaint for insufficiency unless it clearly appears that by no stretch of the imagination is plaintiff entitled to any relief for claims asserted in his complaint. *Kozlowski v. Ferrarra*, 117 F.Supp. 650 (1954). Even if it is doubtful that plaintiff would ultimately prevail, if plaintiff colorably states facts which, if proven, would entitled him relief, motion to dismiss for failure to state a claim should not be granted. *Kronmuller v. West End Fire Co. No. 3 Fire Dept.*, 123 F3rd 170 (1988).

The Petitioner's case should have never been disposed of after filing preliminary objections. The lower courts' acted very quickly depriving the Petitioners their right to conduct discovery and investigate their claims. For example, the taking was filed on January 28, 1999. As a response, the Petitioners filed preliminary objections on February 19, 1999. After the Authority filed answers the court scheduled a conference which was held on March 16, 1999. Two hearings occurred in April 1999. Petitioners attorney was allowed to withdraw in April 1999 and Petitioners were required to pre

pare for trial without discovery. Thus, in less than three months' time, the Petitioners were deprived of their real estate, with no opportunity to conduct meaningful discovery to protect their constitutionally guaranteed interests.

Since the preliminary objections were overruled, the Petitioner's constitutional right to a jury trial was violated. *See Page v. Work*, 290 F.2d 323, 334 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1961). The jury trial is not merely a procedural device, but, a fundamental right and an essential element of self government which the drafters of the Bill of Rights sought to preserve. To safeguard that right from judicial usurpation, the Seventh Amendment prohibits courts from taking away the role of the jury. Under the United States Supreme Court's precedents as to whether there is a statutory or constitutional right to a jury trial on a civil claim under a federal statute, before the court inquiries into the applicability of the federal constitution's Seventh Amendment, the court must first ascertain whether a construction of the statute is fairly possible by which the constitutional question may be avoided; however, where the court declines to find a jury right under the statute, the court must reach the constitutional question. *City of Monterey v. DelMonte Dunes*, 526 U.S. 687, 119 S.Ct. 1624 (1999). Consistent with the textual mandate of the federal constitution's Seventh Amendment that the right to a jury trial be preserved in suits "at common law," the United States Supreme Court, in interpreting the Seventh Amendment, (1) asks whether the court is dealing with a cause of action that either was tried at law at the time of the founding or is at least analogous to one that was; and (2) if the action in question belongs in the law category, then asks whether the particular trial decision must fall to the jury

in order to preserve the substance of the common-law right as it existed in 1791. *Id.*; *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 376, 134 L.Ed. 2d 577, 116 S.Ct. 1384 (1995). In order to preserve the right to a trial by jury in cases interpreting statutes, the Petitioners' case must be heard by a jury.

Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care. *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935); *Chauffeurs, Teamsters and Helpers v. Terry*, 110 S.Ct. 1339, 1344-45 (1990). So vital is this great constitutional right that "it is only in exceptional cases and for specific causes that a party may be deprived of it. *Grand Chute v. Winegar*, 82 U.S. 373, 375 (1872); *Jacob v. New York City*, 315 U.S. 752, 752-753 (1942). The right of jury trial in civil cases at common law is a ...right so fundamental and sacred to the citizens that it should be jealously guarded by the courts". *Id.*

This Honorable Court has been highly protective of the jury's role: "Credibility determinations, the weighing of the evidence, and the drawing of inferences from the facts are jury functions, not those of a judge. *Anderson, supra,* at 255. It would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence and judge the credibility of witnesses. *Id.* The lower courts overruled the Petitioners' objections based upon the state statute's infringement of the their constitutional rights. Under the due process clause, property may not be taken for public use without reasonable notice of the proceedings authorized for its taking and without reasonable opportunity to be heard

as to substantial matters of right affected by the taking. *North Laramie Land Company v. Hoffman*, 268 U.S. 276, 282-283, 45 S.Ct. 491, 497-498 (1925). The Petitioners were never given reasonable opportunity to be heard as to the substantial matters affected by the eminent domain. More specifically, the Petitioners believe that if they were given the opportunity to perform discovery, clear and convincing evidence regarding the church owned hospital's influence over the Authority's decision would be brought forward. As stated in the facts, the Authority and the City were bribed by the Hospital in order to expand its facilities. Since the Hospital is owned by a church, they should have not had any influence over the Authority's and City's decisions, that is, a separation of church and state. Substantial matters affecting the Petitioners' property interests were not examined by the state courts thereby depriving the Petitioners of their constitutional rights.

This Honorable Court must grant this Petition for Certiorari so that it may clarify the standard where a constitutional violation of a statute that does not provide the Petitioners with an opportunity to discovery and investigate their claims and does not give a jury trial when the Seventh Amendment is applicable.

CONCLUSION

The Pennsylvania Supreme Court, and the Commonwealth's lower courts, have placed a high burden of proof upon the Petitioner to overcome a dismissal in the defense of their property interests. The state was bribed by a Church Hospital to perform a quick eminent domain taking of the Petitioners' property interests, in clear violation of their constitutional rights. The Court should grant *certiorari* to review this important matter, clarify the parties burden, order that the Petitioners have a constitutional right to defend their interests before a trier of fact since the statute is per se unconstitutional and their due process rights were violated.

Respectfully submitted,

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APPENDIX A-ORDER, DATED AUGUST 30, 2000

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

IN RE: CONDEMNATION BY THE REDEVELOPMENT AUTHORITY OF THE CITY OF ALLENTOWN OF 235 NORTH FIFTH STREET, CITY OF ALLENTOWN, LEHIGH COUNTY, PENNSYLVANIA, JOE LARRY THORPE (CONDEMNEE), LINDA D. THORPE (CONDEMNEE),

PETITION OF: JOE L. THORPE AND LINDA D. THORPE

No. 0025 M.D. Alloc. Dkt. 2000

Petition for Allowance of Appeal from the Order of the Commonwealth Court

ORDER

PER CURIAM:

AND NOW, this 30th day of August, 2000, the Petition for Allowance of Appeal is hereby DENIED.

APPENDIX B-ORDER AND OPINION, FILED JUNE 1, 1999

IN THE COURT OF COMMON PLEAS OF LEHIGH COUNTY, PENNSYLVANIA CIVIL DIVISION

IN RE: CONDEMNATION BY THE REDEVELOPMENT AUTHORITY OF THE CITY OF ALLETOWN OF 235 NORTH FIFTH STREET, CITY OF ALLENTOWN, LEHIGH COUNTY, PENNSYLVANI

No. 99-C-0209

ORDER

NOW, this 1st day of June, 1999, upon consideration of the preliminary objections of Joe L. Thorpe and Linda D. Thorpe, as condemnees (hereinafter referred to as the "Condemnees"), and after an evidentiary hearing conducted before the undersigned on April 16, 1999 and April 19, 1999, and upon consideration of the record, the Findings of Fact and Conclusions of Law filed by the Parties and for the reasons expressed in the accompanying Opinion,

IT IS HEREBY ORDERED that said preliminary objections are OVERRULED.

IT IS FURTHER ORDERED that the Condemnees shall permithe Redevelopment Authority immediate entrance onto the property located at 235 North Fifth Street, Allentown, Lehigh County, Pennsylvania for the purpose of obtaining appraisal.

BY THE COURT:

Lawrence J. Brenner, J

****

APPEARANCES:

C. COLLINS BROWN, ESQUIRE
On behalf of the Redevelopment Authority of the City of Allentown, as Condemnor

JOE L. THORPE, ESQUIRE,
On behalf of Joe L. Thorpe and Linda D. Thorpe, as Condemnees

****

OPINION

LAWRENCE J. BRENNER, J.

On or about January 28, 1999, the Redevelopment Authority of the City of Allentown, a public body, corporate and politic, established pursuant to the Urban Redevelopment

Law of the Commonwealth of Pennsylvania (hereinafter referred to as the "Redevelopment Authority" or the "Condemnor"), filed its Declaration of Taking[1] for the property located at 235 North Fifth Street, Allentown, Lehigh County, Pennsylvania, which is owned by Joe L. Thorpe and Linda D. Thorpe, a husband and wife (hereinafter referred to as the "Condemnees"). Thereafter, on February 19, 1999, the Condemnees filed Preliminary Objections[2] to the Declaration of Taking. Condemnor filed its Answer to the Preliminary Objections on March 12, 1999. An evidentiary hearing relative to the within matter was conducted before this Court on April 16, 1999 and April 19, 1999.

FINDINGS OF FACT

1. During the mid-1990's, a blight survey was conducted that encompassed 79.214 acres and thirteen thousand six hundred and fifteen residential property (13, 615). (N.T. 4/16/99, pp. 33, 50, 89-90; N.T. 4/19/99, pp. 168, 182;

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[1] The Purpose of the Condemnor's Declaration of Taking is to eliminate blight.

[2] Preliminary objections in the context of eminent domain actions serve a different purpose than preliminary objections filed in other civil actions. *North Penn Water Authority v. Malin*, 168 Pa. Cmwlth. 477, 650 A.2d 1197 (1994). In eminent domain cases, preliminary objections are intended as a procedure to resolve expeditiously the factual and legal challenges to a declaration of taking before parties proceed to determine damages. See Section 406 of the Eminent Domain Code, Act of June 22, 1964, Special Session, P.L. 84, as amended, 26 P.S. § 1-406(a).

Condemnee Ex. 3; Condemnee Ex. 12; Condemnee Ex. 13; Condemnee Ex. 22). As a result, in February of 1998, a blight certification report was prepared by the Department of Code Enforcement for the City of Allentown and the Bureau of Rehabilitation. (Condemnee Ex.22).

2. The Allentown City Planning Commission held public hearings on February 10, 1998 and March 10, 1998, regarding the issue of designating as blight an area in Allentown. (N. T. 4/19/99, 111-112; Condemnee Ex. 2)

3. After reviewing the blight certification report and holding the aforementioned public hearings, Resolution No. 1998-1, entitled "Blight Declaration for an Area Bounded by North Hall, North Fourth, Linden, and Gordon Streets," was adopted on or about April 14, 1998. (N.T. 4/16/99, p. 62). This area encompasses five hundred eighty-five (585) residential properties. (N.T. 4/16/99, p. 33; Condemnee Ex. 3; Condemnee Ex.22).

4. Through Resolution No. 1998-1, the Allentown City Planning Commission certified to the Redevelopment Authority a Redevelopment Area[3] in accordance with the provisions of the Pennsylvania Urban Redevelop-

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[3] Section 1703(n) defines "Redevelopment Area" as follows:

> "Any area, whether improved or unimproved, which a planning commission may find to be blighted because of the existence of the conditions enumerated in section2 of this act so as to require redevelopment under the provision of this act."

35 P.S. §1703(n).

ment Law, Act of May 24, 1945, P.L. 991, as amended, 35 P.S. §§1701 et seq. *See* 35 P.S.§§ 1702 and 1710(b). (N.T. 4/16/99, pp.32, 41-42, 62, 71; N.T. 4/19/99, pp. 80, 166-169, 172-173).

5. The Allentown City Planning Commission, by Resolution No. 1998-1, designated the area bounded by Linden Street on the south, Gordon Street on the north, North Fourth Street on the east and North Hall Street on the west as blighted. (N.T. 4/16/99, p. 32).

6. Approximately forty-four percent (44%) of the exteriors of the buildings in the aforementioned blighted area were deemed to be in fair to poor condition. (N.T. 4/16/99, pp. 30, 36, 41; Condemnee Ex. 2; Condemnee Ex. 12).

7. The Condemnees' property is located within the designated blighted area. (N.T. 4/16/99, pp. 43-44).

8. The Condemnees are in possession of the subject property.

9. By Resolution No. 1998-2, adopted on April 14, 1998, the Allentown City Planning Commission formulated a Redevelopment Area Plan[4], entitled "Sacred Heart Hospital Center for Primary Health and Family Practice De-

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[4] Section 1703(o) defines "Redevelopment Area Plan" as follows:

> "A plan for the redevelopment of all or part of a redevelopment area made by a planning commission in accordance with the provisions of section ten of this act."

35 P.S. § 1703(o).

velopment." *See* 35 P.S. § 1710(c). (N.T. 4/16/99, pp. 62-63, 71-72; N.T. 4/19/99, pp. 166-169).

10. The purpose of the Redevelopment Area Plan was to rehabilitate the blighted area by completing the assemblage of property, making possible the construction, establishment and operation of a Center for Primary Health and Family Practice.

11. Sacred Heart Hospital, a subsidiary of Sacred Heart Care System, a Pennsylvania non-profit corporation, operates the Center for Primary Health and Family Practice. (N.T. 4/16/99, p. 63; N.T. 4/19/99, pp. 14-16; Condemnee Ex. 9)

12. In conformity with Section 1710(c) of the Urban Redevelopment Law, the Redevelopment Area Plan included an area boundary map; land use plan; standards for population density, land coverage and building density; preliminary site plan; zoning changes; changes to street layout and traffic regulations; effects of displacements; a cost estimate; and continuing controls. *See* 35 P.S. § 1710(c)(1)-(9). (Redevelopment Area Plan)

13. The Redevelopment Area Plan was referred to the Redevelopment Authority for the purpose of preparing a Redevelopment Proposal[5] in accordance with the Urban Redevelopment Law, 35 P.S. §§ 1710(a), (d).

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[5] Section 1703(r) defines "Redevelopment Proposal as follows:

> "A proposal, including a copy of the redevelopment area plan and supporting data submitted for approval to the governing body by [a] [Redevelopment] Authority, for

14. In compliance with Section 1710(d) of the Urban Redevelopment Law, the Redevelopment Authority held a public hearing on August 11, 1998, pursuant to its preparation of a Redevelopment Proposal for the Redevelopment Area. (Condemnee Ex. 8).

15. On or about September 8, 1998, in accordance with Section 1710 of the Urban Redevelopment Law, the Redevelopment Authority adopted a resolution entitled, "Resolution of the Redevelopment Authority of the City of Allentown Providing for the Approval of the Redevelopment Area Plan and the Approval for the Redevelopment Proposal of the Sacred Heart Hospital Center for Primary Health and Family Practice Development Project." (N.T. 4/19/99, pp. 78-82, 84, 86-90; Condemnor Ex.2).

16. Prior to adopting the aforementioned resolution, the Redevelopment Authority reviewed substantial documentation to substantiate that the Sacred Heart Hospital Center for Primary Health and Family Practice Development Project was a public purpose project. (N.T. 4/19/99 pp. 84-89). Such documentation included:

    A. United States Department of Housing and Urban Development Special Purpose Grant Application (Condemnee Ex. 9; Condemnor Ex. 4);
    B. Letter from the United States Department of Housing and Urban Development to Mayor

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the redevelopment of all or any part of a redevelopment area."

35 P.S. § 1703(r).

Heydt announcing the approval of the Special Purpose Grant (Condemnor Ex. 2);

C. Bill No. 9-1996, dated February 7, 1996, passed by the Council of the City of Allentown, providing for the expenditures of monies received under the Special Purpose Grant (Condemnor Ex.5);
D. Application for a grant to HRSA (Condemnor Ex.2);
E. Summary of the Redevelopment Authority's public hearing held on August 11, 1998 (Condemnor Ex. 2; Condemnee Ex. 8);
F. Resolution 1998-1 of the Allentown City Planning Commission (Condemnor Ex. 2); and
G. Resolution 1998-2 of the Allentown City Planning Commission (Condemnor Ex. 2).

(N.T. 4/19/99, pp. 84-89; Condemnor Ex. 2).

17. The Redevelopment Authority submitted the subject Redevelopment Proposal to the Allentown City Planning commission for review on September 11, 1998, pursuant to Section 1710(e) of the Urban Redevelopment Law. (N.T. 4/19/99, pp. 80-81).

18. The Allentown City Planning Commission, by Resolution 1998-3, dated October 13, 1998, certified to the governing body[6] of the City of Allentown, the Council

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[6] Section 1703(f) defines "Governing Body" as follows:

"In the case of a city, the city council or other legislative body thereof and in the case of a county, the board of county commissioners or other legislative body thereof."

35 P.S. § 1703(f)

of the City of Allentown, its favorable recommendation on the Redevelopment Proposal. (N.T. 4/19/99, p.81).

19. On October 26, 1998, the Redevelopment Authority submitted the Redevelopment Proposal to the Council of the City of Allentown. *See* 35 P.S. § 1710(f).

20. On December 2, 1998, the Council of the City of Allentown conducted a public hearing in compliance with Section 1710(g) of the Urban Redevelopment Law.

21. The Council of the City of Allentown, by Resolution Number 41, approved the Redevelopment Proposal for the Sacred Heart Hospital Center for Primary Health and Family Practice Development on December 2, 1998, authorizing the Redevelopment Authority to acquire all7 properties affected by the Redevelopment Proposal. *See* 35 P.S. §1710(i). (N.T. 4/19/99, pp. 91-92; Condemnor Ex. 3; Condemnee Ex. 19).

22. On December 8, 1998, the Redevelopment Authority adopted a resolution authorizing the acquisition of the Conemnees' property located at 235 North Fifth Street, Allentown, Lehigh County, Pennsylvania, through the power of eminent domain, if necessary, in order to ac-

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[7] There was more than one (1) property involved at the commencement of the procedure as it would relate to the Redevelopment Area Plan and the Sacred Heart Hospital Center for Primary Health and Family Practice project. (N.T. 4/19/99, pp. 82-83). Needed, thirty (30) properties were affected. (N.T. 4/19/99, p. 83; Condemnee Ex.)

complish the public purposes of the Urban Redevelopment Act and the Redevelopment Proposal.

23. A draft of a Redeveloper's Contract was prepared by the Redevelopment Authority which involved the sale of land for private development between the Redevelopment Authority and Sacred Heart Hospital. (N.T. 4/19/99, p. 82; Condemnee Ex. 20).

24. From a site planning standpoint, the removal this subject property makes good sense. (N.T. 4/16/99, p. 69; N.T. 4/19/99, pp. 173-176).

25. The Certification of Blight and the preparation of the Redevelopment Area Plan by the Allentown City Planning Commission and the Redevelopment Proposal by the Redevelopment Authority occurred at a time when a public need for a primary health care facility in center city Allentown already had been recognized by the City of Allentown and Sacred Heart Hospital. (N.T. 4/19/99, pp. 43-56, 102-103, 205-208).

26. In fact, prior to 1994, Sacred Heart Hospital identified a need for the new Center for Primary Health and Family Practice because Sacred Heart Hospital was experiencing serious shortages in space, accommodations and physician providers to address the growing needs and demands of the community. (N.T. 4/19/99, pp. 43-44).

27. Consequently, on or around March 21, 1995, the City of Allentown received a Special Purpose Grant from the United State Department of Housing and Urban Development in the maximum amount of One Million Five Hundred Thousand ($1,500,000.00) dollars. This grant

was awarded for the development of a Center for Primary Health and Family Practice which was needed to provide services to the undeserved residents of the City of Allentown. (Condemnee Ex. 9; Condemnor Ex. 4; N.T. 4/19/99 p. 26)

28. The Council of the City of Allentown, by Bill No. 9-1996, dated February 7, 1996, passed an ordinance providing for the expenditure of the monies received under the Special Purpose Grant for the purpose of supporting the development of the Sacred Heart Hospital Center for Primary Health and Family Practice. (Condemnee Ex. 1; Condemnor Ex. 5).

29. On or about August 7, 1996, Sacred Heart Hospital entered into a Participating Party Agreement with the City of Allentown to accept the special purpose grant funds from the United State Department of Housing and Urban Development. (N.T. 4/19/99, pp. 26-27, Condemnee Ex. 14; Condemnee Ex. 21).

30. Thereafter, on November 6, 1997, the Redevelopment Authority and Sacred Heart Hospital, as redeveloper, entered into an agreement whereby Sacred Heart Hospital agreed to indemnify the Redevelopment Authority for its part in the redevelopment of the area surrounding Sacred Heart Hospital. (Condemnee Ex. 1).

31. Due to its location, Sacred Heart Hospital provides the majority of the health car to low income, underinsured and uninsured residents of inner-city Allentown. (N.T. 4/16/99, p. 58; N.T. 4/19/99, pp. 43-56, 102-103, 205-208). In fact, Sacred Heart Hospital is the only full ser-

vice acute care hospital located in the City of Allentown.

32. The population of elderly residents, young children and minorities continues to grow in the City of Allentown, particularly the inner-city. (N.T. 4/19/99, pp. 48-50). This constant growth places a heavy burden on the health care system in the City of Allentown. (N.T. 4/19/99, pp. 43-56, 58, 102-103, 205-208). Therefore, the need for increased primary and preventative health care services that are accessible and affordable to the aforementioned population is immediate. (N.T. 4/19/99, pp. 43-56, 102-103, 205-208, Condemnee Ex.9).

33. Sacred Heart Hospital's lead role in the Center for Primary Health and Family Practice Development is critical since Sacred Heart Hospital has demonstrated deep commitment to providing accessible and affordable high-quality health care services to the undeserved residents of inner-city Allentown. (N.T. 4/19/99, pp. 43-56, 102-103, 205-208; Condemnee Ex.9).

34. The Sacred Heart Hospital Center for Primary Health and Family Practice is intended to provide and increase the availability of a full-range of primary and preventative health care services to the residents of inner-city Allentown, with a particular emphasis on the low income families, the uninsured, children and the elderly, as well as to ensure that these services will be available for the long term. (N.T. 4/19/99, pp. 43-56, 102-103, 205-208; Condemnee Ex. 9).

35. In support of Sacred Heart Hospital's development of a Center for Primary Health and Family Practice Development, the City of Allentown received public purpose funding through the aforementioned United States Department of Housing and Urban Development Special Purpose Grant, a Pennsylvania Department of Public Welfare grant in the amount of One Million ($1,000,000.00) dollars and a United States Department of Health and Human Resources grant in the amount of One Million Nine Hundred Fifty-Nine Thousand ($1,959,000.00) dollars. (N.T. 4/16/99, pp. 56-57; N.T. 4/19/99, pp. 53056, 195-197). Other funding included a Two Hundred Thousand ($200,000.00) dollar grant from the Trexler Trust, One Mill ($1,000,000.00) dollars from the Signal family and corporate commitments totaling approximately One Million Five Hundred Thousand ($1,500,000.00) dollars. (N.T. 4/19/99, p. 53).

36. The Condemnees' property is necessary for the Sacred Heart Hospital Center for Primary Health and Family Practice in order to provide adequate parking for the infirmed, elderly young children and the obstetrics and gynecological patients who need immediate access to this facility. (N.T. 4/19/99, pp. 51-52, 103-105, 173-176). The increasing level of activity and the sheer high volume of patients necessitates the acquisition of the Condemnees' property. (N.T. 4/19/99, pp. 44-52).

37. The Sacred Heart Hospital Center for Primary Health and Family Practice seeks to improve the health status of the community which aids economic and community development by reducing health care costs, reducing the incidence of potentially debilitating diseases, improving

sanitation and maintaining a health population. In addition, the Sacred Heart Hospital Center for Primary Health and Family Practice revitalizes, beautifies and improves the security in the neighborhood. (Condemnee Ex. 9)

38. The Center for Primary Health and Family Practice saw its first patient in March of 1999. (N.T. 4/19/99, p. 98)

CONCLUSIONS OF LAW

1. The Redevelopment Authority, the Allentown City, Planning Commission and the Council of the City of Allentown have satisfied all the statutory requirements mandated by the Pennsylvania Urban Redevelopment Law prior to the Redevelopment Authority's decision to acquire the Condemnees' property by eminent domain. 35 P.S. §§ 1701-1719.

2. The Redevelopment Authority has the discretion of preparing a Redevelopment Proposal for the redevelopment of all or part of the blighted areas. 35 P.S. § 1710(d).

3. The elimination of blight by redeveloping the Redevelopment Area for a Center for Primary Health and Family Practice facility which will meet the long term health care needs of the undeserved, elderly, minority, low income, underinsured and uninsured residents of innercity Allentown constitutes a proper public purpose. 35 P.S. § 1702.

4. The Redevelopment Authority has the authority to exercise the power of eminent domain over the property lo-

cated at 235 North Fifth Street, Allentown, Lehigh County, Pennsylvania. 35 P.S. §§ 1702, 1712.

5. A taking of property by the power of eminent domain does not lose its public purpose character merely because there may exist in the operation some feature of private gain, for if the public good is enhanced, it is immaterial that a private interest also may be furthered.

6. The Redevelopment Authority may convey the subject property to a private entity for redevelopment, as envisioned by the Pennsylvania Urban Redevelopment Law.

7. The condemnation of the property situated at 235 North Fifth Street, Allentown, Lehigh County, Pennsylvania, is within the reasonable discretion of the Redevelopment Authority and it is not an excessive taking.

8. Condemnees have not met their heavy burden of demonstrating that the Redevelopment Authority is guilty of bad faith or committed an abuse of discretion or acted in an arbitrary, capricious or fraudulent manner with regard to the decision to condemn the property located at 235 North Fifth Street, Allentown, Lehigh County, Pennsylvania.

9. The actions of the Redevelopment Authority do not constitute an improper delegation of authority to a private entity, but instead demonstrate a proper exercise of its discretion with regards to the redevelopment and rehabilitation of a blighted area.

10. Condemnees have not met their heavy burden of proving that there was any collusion by, between or among

the Redevelopment Authority, the Allentown City Planning Commission, the Council of the City of Allentown and Sacred Heart Hospital regarding this eminent domain proceeding.

DISCUSSION

A. *Statutory Compliance*

Initially we note that the scope of judicial review of a certification of blight is a limited one. *In re Condemnation by the Redevelopment Auth. of the City of Harrisburg*, 30 Pa. Cmwlth. 273, 276, 373 A.2d 774, 775 (1977). Indeed, "[t]he power of discretion over what areas are to be considered blighted is solely within the power of the [Redevelopment]Authority. The only function of the courts in this matter is to see that the [Redevelopment] Authority has acted not in bad faith; to see that the [Redevelopment] Authority has followed the statutory procedures in making its determination; and finally, to see that the actions of the [Redevelopment] Authority do not violate any of our constitutional safeguards." *City of Harrisburg*, 30 Pa. Cmwlth. a 276, 373 A.2d at 776 (citing *Crawford v. Redevlopment Auth.*, 418 Pa. 549, 554, 211 A.2d 866, 868 (1965)).

In the instant case, the record clearly demonstrates that the Redevelopment Authority, the Allentown City Planning Commission and the Council of the City of Allentown have satisfied all of the statutory requirements imposed by the Urban Redevelopment Law, 35 P.S. §§ 1701-1719. The redevelopment of the Redevelopment Area was initiated pursuant to the Urban Redevelopment Law, 35 P.S. § 1702, when, on April 14, 1998, the Allentown City Planning Commission

declared blighted an area in the inner-city of Allentown bounded by Linden Street on the south, Gordon Street on the north, North Fourth Street on the East and North Hall Street of the west. The record indicates that the Allentown City Planning Commission based its decision on a blight certification report that was prepared by the Department of Code Enforcement for the city Allentown and the Bureau of Rehabilitation in February of 1998, as well as public hearings that were held by the Allentown City Planning Commission regarding whether the area should be designated a blighted. After these hearings and review of the reports and supporting documentation provided, the Allentown City Planning Commission declared the area to be blighted. Consequently, the Redevelopment Authority promulgated a Redevelopment Proposal which was then submitted to the Council of the City of Allentown on October 26, 1998. Thereafter, on December 2, 1998, the Council of the City of Allentown approved the Redevelopment Proposal for the Sacred Heart Hospital Center for Primary Health and Family Practice Development. These actions are consistent with the procedures outlined in the Urban Redevelopment Law, 35 P.S. §§ 1701-1709. *Belovsky v. Redevelopment Auth.*, 357 Pa. 329, 335-336, 54 A.2d 277, 280-281 (1947);

Furthermore, the condemnees' contention that the Redevelopment Authority acted improperly in producing a Redevelopment Proposal that involved only a portion of the area originally certified as blighted is without merit. This Court recognizes that a Redevelopment Proposal need not address the entire area that has been designated as blighted. In fact, a Redevelopment Proposal which addresses only a portion of a blighted area is specifically authorized in the Urban Rede-

velopment Law. *See* 35 P.S. § 1710(d)8; *City of Harrisburg*, 30 Pa. Cmwlth. at 277, 373 A.2d at 776.

Moreover, the Condemnees presented no evidence that the actions of the Redevelopment Authority, the Allentown City Planning Commission or the Council of the City Allentown leading up to the condemnation of the Condemnees' property were arbitrary or capricious. It should be noted that the fact that the Condemnees' property may itself be structurally sound is not sufficient to prevent the condemnation when it is located in an are properly determined to be blighted. *City of Harrisburg*, 30 Pa. Cmwlth. at 277, 373 A.2d at 776; *Leo Realty Co. v. Redevelopment Auth. of Wilkes-Barre*, 13 Pa. Cmwlth. 288, 291, 320 A.2d 149, 151 (1974). Accordingly, this Court finds that the respective governing authorities, namely the Redevelopment Authority, the Allentown City Planning Commission and the Council of the City of Allentown, acted appropriately and legally with regard to this condemnation proceeding.

B. *Public Purpose*

The Condemnees next argue that the condemnation was for a private purpose, rather than for a public purpose, because the condemnation was solely for the benefit of Sacred Heart Hospital. We cannot agree with this assertion. The Redevelopment Proposal serves the multi-faceted public

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8 Section 1710(d) states in pertinent part:

> "In conformity with such redevelopment area plan the Authority shall prepare a proposal for the redevelopment of *all or part of such area*."

35 P.S. § 1710(d) (emphasis added).

purpose of the elimination of blight an the development of a desperately need facility.[9]

Firstly, the court of this Commonwealth have consistently held that public uses for eminent domain purposes include the redevelopment of blighted areas. *Belovsky*, 357 Pa. at 339, 54 A.2d at 282. The condemnees' property is located within the area certified to be blighted, within the Redevelopment Area Plan and within the area to be redeveloped pursuant to the Redevelopment Proposal. As a consequence, the Redevelopment Authority is fully within its statutorily conferred authority to constitutionally exercise its power of eminent domain upon the Condemnees' property. 35 P.S. § 1702. Specifically, Section 1702 of the Urban Redevelopment Law states in pertinent part:

> [I]t is hereby declared to be the policy of the Commonwealth of Pennsylvania to promote the health, safety and welfare of the inhabitants thereof by the creation of bodies corporate and politic to be known as *Redevelopment Authorities, which shall exist and operate for the public purposes of the elimination of blighted areas through economically and socially sound redevelopment of such areas*, as provided by this act, in conformity with the com-

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[9] It should be noted that the federal government, through the United States Department of Housing and Urban Development, has found that the Sacred Heart Hospital Center for Primary Health and Family Practice serves a public purpose by providing health care to the undeserved residents of inner-city Allentown. The federal government only endows with funds those projects that have public purposes.

> prehensive general plan of their respective municipalities of residential, recreational, commercial, industrial or other purposes, and otherwise encouraging the provision of healthful homes, a decent living environment and adequate places of employment of the people of this Commonwealth. *Such purposes are hereby declared to be public uses* for which public money may be spent and private property may be acquired by the exercise of the power of eminent domain.

35 P.S. § 1702 (emphasis added).

Furthermore, this Court notes that a taking does not lose its public character merely because there may exist in the operation some feature of private gain. *In re Condemnation of Land of Heim*, 151 Pa. Cmwlth. 438, 446. 617 A.2d 74, 78, *appeal denied*, 535 Pa. 625, 629 A.2d 1385 (1992); *Belovsky*, 357 Pa. at 341, 54 A.2d at 283; *In re Condemnation of Lands in City of Scranton v. Dakiewicz*, 132 Pa. Cmwlth. 175, 183, 572 A.2d 250, 254 (1990). It is well-settled law that as long as the public good is enhanced, it is immaterial that a private interest may also benefit. *Id.* In the instant case, the testimony indicated that the elimination of blight and the proposed Sacred Heart Hospital Center for Primary Health and Family Practice will greatly benefit the community by increasing the availability of health care services to the undeserved residents of inner-city Allentown and by ensuring that these services will be available to the growing populations of elderly residents, young children and minorities for the long term. It is inconsequential that this proper transfer of the blighted property to Sacred

Heart Hospital will provide a benefit to the private owner. The requirement is not that there be a weighing of benefit to the public and private sectors, but rather only that there be some evident public purpose which pervades the venture at issue. *Appeal of Mershon*, 76 Pa. Cmwlth. 424, 463 A.2d 1287 (1983).

In addition, the Condemnees contend that the Redevelopment Authority's taking of their property and then subsequently conveying it to Sacred Heart Hospital, as redeveloper, advances a private party's interest and not a public purpose. However, this argument is without merit since courts of this Commonwealth have consistently rejected similar arguments. *See Belovsky*, 357 Pa. at 340, 54 A.2d at 282-283 (stating that a public purpose does not require a continuing of ownership of the property in order to carry out the full purpose of the Urban Redevelopment Act, but is directed solely to the clearance, reconstruction and rehabilitation of the blighted area, and after this is accomplished, the public purpose is completely realized and it is proper that the property be re-transferred to private ownership); *City of Scranton*, 132 Pa. Cmwlth. at 182-183, 572 A.2d at 254. While it is true that private property cannot be taken by eminent domain for the sole purposes of devoting it to a private purpose of another, if the property is taken for a proper public purpose, the property may be permitted to revert to private ownership when the public purpose is discharged. *Fleet v. Redevelopment Auth. of Washington County*, 147 Pa. Cmwlth. 169, 607 A.2d 311, *appeal denied*, 533 Pa. 603, 617 A.2d 1276 (1992). The removal

of blight, as in the instant case, serves a public purpose. *Id.*

Finally, even though the Sacred Heart Hospital Center for Primary Health and Family Practice is open an operational, the condemnation of the property located at 235 North Fifth Street, Allentown, Lehigh County, Pennsylvania, is not excessive in light of the Redevelopment Area Plan and the Redevelopment Proposal for the redevelopment of the blighted area. This Court recognizes that private property may only be acquired in an eminent domain proceeding to the extent reasonably required for the public. *Redevelopment Auth. of the City of Erie v. Owners*, 1 Pa. Cmwlth. 378, 391, 274 A.2d 244, 251 (1971); *Pennsylvania Dept. of Trans. v. Montgomery Township*, 655 A.2d 1086, 1089 (Pa. Cmwlth.), *appeal denied*, 542 Pa. 651, 666 A.2d 1059 (1995); *In re Condemnation of Property of Waite*, 163 Pa. Cmwlth. 283, 289, 641 A.2d 25, 28, *appeal denied*, 539 Pa. 657, 651 A.2d 543 (1994). However, the quantum of land to be acquired in a condemnation proceeding is a matter within the discretion of the condemnor. *Id.*

In the instant case, the Redevelopment Authority determined that from a planning and public safety standpoint, and in light of the traffic patterns in the vicinity of the Redevelopment Area, the Condemnees' property is necessary for the Sacred Heart Hospital Center for Primary Health and Family Practice facility. In particular, the taking of the Condemnees' property is necessary in order to provide adequate accessible parking for the elderly, the disabled, young children and the obstetric and gynecological patients, who need immediate access to

the facility. The structure located at 235 North Fifth Street prevents this contemplated access to the parking lot. Thus, in consideration of the safety of the patients visiting the center, the Redevelopment Authority has deemed the condemnation of the property to be necessary. This Court finds that this determination is within the reasonable discretion of the Condemnor.

C. *Burden of Proof*

Condemnees assert that the Redevelopment Authority, the Allentown City Planing Commission and the Council of the City of Allentown did not consider the public welfare in making their determination with regard to the redevelopment of the Redevelopment Area, but merely considered the wishes and desires of Sacred Heart Hospital. Specifically, the Condemnees argue that the Redevelopment Authority embarked on the arduous process of blight certification and the preparation of a Redevelopment Proposal solely at the request of Sacred Heart Hospital. However, the Condemnees have failed to set forth evidence to establish this claim that the Redevelopment Authority pursued a private motivated purpose at the initiation of a private entity. Therefore, their argument must fail.

Initially we note that a planning commission and a redevelopment authority are presumed to act in good faith [10] in declaring an area of blight. *In re Condemna-*

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[10] It should be noted that:

> "The [ ] words [palpable bad faith] have vital meaning when used as a limitation on the power of a governmental

tion of Premises 130 Court Street in the City of Reading, 36 Pa. Cmwlth. 394, 397, 388 A.2d 1108, 1109-1110 (1978). The burden of proving fraud or an abuse of discretion is an extremely heavy one. *In re School District of Pittsburgh*, 430 Pa. 566, 244 A.2d 42 (1968); *In the Matter of Urban Redevelopment Auth. of E-V Co.*, 117 Pa. Cmwlth. 475, 482, 544 A.2d 87, 91 (1988), *affirmed*, 527 Pa. 550, 594 A.2d 1375 (1990). Furthermore, the party seeking to prove that a municipality's decision to condemn property was an abuse of discretion carries extremely heavy burden. *Heim*, 151 Pa. Cmwlth. at 442, 617 A.2d at 76; *In re Condemnation of Land Owned by Spory*, 54 Pa. Cmwlth. 17, 21, 419 A.2d 804, 805 (1980); *Pidstawski v. South Whitehall Township*, 33 Pa. Cmwlth, 162, 380 A.2d 1322 (1977). There is strong

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> authority to condemn property. Bad faith is generally the opposite of good faith and . . . implies a tainted motive of interest. Bad faith becomes palpable wen such motive is obvious or readily perceived. The courts have the responsibility to see that an authority has not acted in bad faith, and that property be taken by eminent domain only to the extent reasonably required for the purpose for which the power is exercised."

Erie, 1 Pa. Cmwlth. at 383, 274 A.2d at 247. Furthermore, a party alleging that an authority has acted in "palpable bad faith" must prove it by clear, precise and indubitable evidence. *Id.*; *In Re Condemnation Redevelopment Auth. of the City of Lancaster*, 682 A.2d 1369, 1372 (Pa. Cmwlth. 1990); *Fleet*, 147 Pa. Cmwlth. at 172, 607 A.2d at 312. Condemnees clearly have failed to sustain this burden.

presumption that the condemnor has acted properly. *Waite*, 163 Pa. Cmwlth. at 288, 641 A.2d at 28.

While it is true that Sacred Heart Hospital has purchased properties for a number of years in the blighted areas prior to the area's designation as blighted, no facts were brought forth in the record or at the evidentiary hearing to support the argument that the Redevelopment Authority exercised its power of eminent domain at the request of Sacred Heart Hospital in securing the properties in the vicinity of the Sacred Heart Hospital Center for Primary Health and Family Practice. Instead, the record reveals that the Redevelopment Proposal, as part of the Redevelopment Area Plan, incorporated initiatives undertaken by the City of Allentown beginning several years prior to the certification of blight by the Allentown City Planning Commission. Central to those initiatives and to the Redevelopment Proposal was a Center for Primary Health and Family Practice to be run and maintained by Sacred Heart Hospital in order to sustain the increased public need for a primary health care facility in center city Allentown. The fact that the Redevelopment Authority chose to address this particular area when a need already had been identified, and Sacred Heart Hospital was prepared to develop this area in accordance with satisfying need, illustrates the practical issues connected with the decision of the Redevelopment Authority to rehabilitate a blighted area. The Urban Redevelopment Law and the cases thereunder provide that a Redevelopment Authority, as condemnor, has the authority to make such decisions with regard to the desired redevelopment of the blighted areas. *Crawford*, 418 Pa.

at 554, 211 A.2d at 868. This Court finds that the Redevelopment Authority's decision to rehabilitate the blighted area in a manner that accomplishes public good by providing primary health care to the elderly, young children, and minorities and the economically disadvantaged residents of inner-city Allentown, is not an abuse of discretion or a capricious, arbitrary or fraudulent act or an act of bad faith. *See Fleet*, 147 Pa. Cmwlth. at 173-174, 607 A.2d at 313.

Furthermore, Condmenees argue that the failed negotiations between them and Sacred Heart Hospital regarding the sale of their property establishes that the Redevelopment Authority, the Allentown City Planning Commission and the Council of the City of Allentown have act4d in collusion with Sacred Heart Hospital in this condemnation proceeding. However, we cannot agree with such an assertion.

The Urban Redevelopment Law provides the statutory framework within which the Redevelopment Authority acts and provides the source of authority for the Redevelopment Authority to exercise the power of eminent domain. 35 P.S. §§ 1701 *et seq.* The Urban Redevelopment Law mandates that the Redevelopment Authority act in conjunction with the Allentown City Planning Commission and the Council of the City of Allentown. Since the Redevelopment Authority cannot act alone, it would be ineffective for it to solely delegate its power of eminent domain to Sacred Heart Hospital. Indeed, a more widespread conspiracy among al three (3) government agencies must exist in order to effectively delegate the authority to Sacred Heart Hospital for

its private purposes. Although Condemnees have asserted that such a conspiracy existed, they have failed to provide any evidence to support this theory. To the contrary, the record is replete with considerations of the public good and the general welfare of the community by the Redevelopment Authority, the Allentown City Planning Commission and the Council of the City of Allentown, as well as strict compliance with the urban redevelopment process. Accordingly, this Court finds that the rightful exercise of discretion does not constitute an unconstitutional delegation of authority to a private entity.

Based on the foregoing reasons, this Court finds that the Redevelopment Authority, the Allentown City Planning Commission and the Council of the City of Allentown id not act arbitrarily, capriciously, in bad faith or fraudulently in fulfilling the public purpose of rehabilitating a blighted area by providing an urgently needed primary health care facility.[11]

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[11] Furthermore, it should be noted that the agreement dated November 6, 1997, between the Redevelopment Authority and Sacred Health Hospital, as redeveloper, whereby Sacred Heart Hospital agreed to indemnify the Redevelopment Authority for its part in the redevelopment of the areas surrounding Sacred Heart Hospital is not indicative or representative of bad faith or collusion. In fact, the Pennsylvania Supreme Court has held that such agreements are not per se improper. *In the Matter of the Condemnation by the Township of Upper St. Clair v. Fryer*, 138 Pa. Cmwlth. 321, 324, 587 A.2d 907, 909 (1991). *See Also Heim*, 151 Pa. Cmwlth. at 446-448, 617 A.2d at 78-79; *Washington Park, Inc. Appeal*, 425 Pa. 349, 356-357, 229 A.2d 1, 4-5 (1967).

Accordingly, for all of the aforementioned reasons, the Condmenees' Preliminary Objections are overruled.

APPENDIX C – MEMORANDUM OPINION BY JUDGE COLINS, FILED DECEMBER 21, 1999

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: CONDEMNATION BY THE REDEVELOPMENT AUTHORITY OF THE CITY OF ALLENTOWN OF 235 NORTH FIFTH-STREET, CITY OF ALLENTOWN, LEHIGH COUNTY, PENNSYLVANIA, JOE LARRY THORPE (CONDEMNEE) LINDA D. THORPE (CONDIEMNEE) No. 1595 C.D. 1999

JOE L. THORPE and LINDA D. THORPE,
Appellants

Submitted : November 12, 1999

BEFORE:

HONORABLE JAMES GARNDER COLINS, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE JOSEPH F. McCLOSKEY, Senior Judge

OPINION NOT REPORTED

MEMORANDUM OPINION BY JUDGE COLINS

FILED: December 21, 1999

Joe L. Thorpe and Linda D. Thorpe appeal the order of the Court of Common Pleas of Lehigh County (trial court) dismissing their preliminary objections to the Redevelopment Authority of the City of Allentown's (Authority) declaration of taking and granting the Authority immediate entrance onto the property owned by the Thorpes for the purpose of obtaining an appraisal. We affirm.

The property owned by the Thorpes, located in the City of Allentown is in an area designated as "blighted." (Findings of Fact No.7) Pursuant to resolution, the Allentown City Planning Commission formulated and ultimately adopted a redevelopment area plan intended to rehabilitate the blighted area through the establishment and operation of a Center for Primary Health and Family Practice. (Findings of Fact Nos. 9-21.) On December 8, 1998, the authority adopted a resolution authorizing the acquisition of the Thorpe property through the power of eminent domain. (Finding of Fact No.22)

When negotiations for the purchase of the Thorpe property proved unavailing, the Authority filed a declaration of taking in response to which the Thorpes filed preliminary objections. Without holding an evidentiary hearing, the trial court overruled the preliminary objections. This appeal followed.

Initially, we note that the Thorpe brief fails to address the questions presented in contravention of Pa.R.A.P. 2119 (relating to Argument). While the brief does provide references to the record, the argument presented is a mere recitation of what the Thorpes believe were errors in the prior proceeding, and it fails to analyze the questions within the context of the

law. However, we do not conclude this is fatal to the appeal; therefore, the merits of each issue presented are addressed.

Our scope of review of a trial court's order dismissing condemnee's preliminary objections is limited to determining whether the trial court abused its discretion or committed an error of law. *In re Condemnation of Penn Township,* 702 A.2d 614 (Pa.Cmwlth.1997). In eminent domain proceedings, preliminary objections are the exclusive means of challenging a declaration of taking, and the trial court is required to resolve the preliminary objections promptly, and is required to take evidence only where an issue of fact is raised. Section 406(a), (e) of the Eminent Domain Code, 12 26 P.S. §406(a) and (e).

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12 Section 406(a), (e) of the Eminent Domain Code, Act of June 22, 1964, P.L. 84, Sp.Sess., 26 P.S. § 10406(a), (e) states:

> (a) . . . Preliminary objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated: (2) the sufficiency of the security; (3) any other procedure followed by the condemnor; or (4) the declaration of taking.
>
> (e) The court shall determine promptly all preliminary objections and make such preliminary and final orders and decrees as justice shall require, including the revesting of title . . . If an issue of fact is raised, the court shall take evidence by depositions or otherwise.

The Thorpes (condemnees) allege that the trial court abused its discretion in not allowing discovery and by ignoring important evidence, preventing them form obtaining a fair hearing. We have paged through the voluminous record and can find no support for this contention. Nine days elapsed between the filing of the preliminary objections and the scheduled evidentiary hearing. In that nine-day period, condemnees were required to prepare themselves for the hearing on the preliminary objections they filed. Condemnees fail to point to disputed factual issues and fail to establish what evidence they were precluded from introducing into court. Since condemnees have failed to substantiate the manner in which the trial court abused its discretion, we conclude this issue lacks merit.

Condemnees also contend that the trial court misapplied the law. Since condemnees failed to develop properly this argument in their brief to this Court, we will not act as their advocate and resolve issues not properly presented. There fore, this issue is not reviewed because it had not been adequately briefed to this Court.

JAMES GARNER COLLINS, Judge

Judge Friedman concurs in the result only.

The court may allow amendment or direct the filing of a more specific declaration of taking.

APPENDIX D – ORDER DATED DECEMBER 21, 1999

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

IN RE: CONDEMNATION BY THE REDEVELOPMENT AUTHORITY OF THE CITY OF ALLENTOWN OF 235 NORTH FIFTH-STREET, CITY OF ALLENTOWN, LEHIGH COUNTRY, PENNSYLVANIA, JOE LARRY THORPE (CONDEMNEE) LINDA D. THORPE (CONDEMNEE)

No. 1595 C.D. 1999

JOE L. THORPE and LINDA D.THORPE,
Appellants

ORDER

AND NOW, this 21st day of December 1999, the order of the Court of Common Pleas of Lehigh County is affirmed.

JAMES GARDNER COLINS, Judge

No. 00-883

In The

Supreme Court of the United States

JOE L. THORPE AND LINDA D. THORPE,

Petitioners,

v.

REDEVELOPMENT AUTHORITY OF THE CITY OF ALLENTOWN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Pennsylvania

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Does the Petition raise an issue meriting review in the Supreme Court of the United States through its assertion that the Pennsylvania Eminent Domain Code does not provide a Condemnee with an opportunity to defend his/her property interests in accord with the due process clause of the United States Constitution, when the Pennsylvania Eminent Domain Code contains specific provisions regarding notice to a Condemnee upon the filing of a Declaration of Taking and procedural provisions by which a Condemnee may object to the taking and receive judicial review of such objections?

-(Negative answer sought by Respondent)

II. Does the Petition properly raise the issue of whether or not the Preliminary Objections should have been dismissed when the evidentiary hearing on the Preliminary Objections was conducted by a judge of the Lehigh county court of common pleas of Pennsylvania without a jury, when the Petitioner did not request a jury at the evidentiary hearing, did not raise any objection whatsoever as to the lack of a jury at this evidentiary hearing in any of their filings with the Lehigh county court of common pleas, did not raise this as an issue on appeal to the Pennsylvania commonwealth court, and did not raise this as an issue in its petition for allowance of appeal to the Pennsylvania supreme court?

-(Negative answer sought by the Respondent)

III. Does the Petition present an issue appropriate for a grant of Certiorari by asserting that the Pennsylvania state courts erred in dismissing

COUNTER-STATEMENT OF QUESTIONS PRESENTED – Continued

the Petitioners' Preliminary Objections to the Declaration of Taking when the trial court promptly determined such Preliminary Objections as provided by the Pennsylvania Eminent Domain Code and made its order?

-(Negative answer sought by the Respondent)

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OBJECTION TO STATEMENT OF JURISDICTION OF THE SUPREME COURT

The Petition states that 28 U.S.C.A. §1254 (1988) provides the basis for jurisdiction for the Supreme Court of the United States for such Petition. 28 U.S.C.A. §1254 provides for the discretionary jurisdiction of the Supreme Court of the United Sates from cases in the federal courts of appeals upon the petition for a writ of certiorari of any party to any civil or criminal case, before or after rendition of judgment or decree, or by certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court of the United States may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. This Petition does not present a civil or criminal case that was heard in any court of appeals, and as a consequence 28 U.S.C.A. §1254 does not provide the jurisdictional basis for this Petition to the Supreme Court. 28 U.S.C.A. §1257 (1988) provides a basis for jurisdiction for the Supreme Court from final judgments or decrees rendered by the highest court of a State in which a decision could be had. The highest court of the State in which a decision could have been had for the underlying case which is the subject of this Petition was the Pennsylvania supreme court. The Pennsylvania supreme court denied allocator by its order of August 30, 2000, and did not enter a judgement on the merits, but rather the Pennsylvania commonwealth court entered its Order on December 21, 1999 affirming the Order of the court of common pleas of Lehigh County, Pennsylvania.

COUNTER-STATEMENT OF THE CASE

The Petition's descriptions of the procedural history and facts in this case are so replete with inaccuracies or assertions having sparse relation to the record, and are so intertwined with argumentative charges masquerading as fact to which no competent evidence has been offered, as to almost defy any attempt at a concise point-by-point discussion. To the extent inconsistent with the procedural background and facts set forth below, the Petition's statement of the case should be regarded with great caution.

Procedural Background

The Redevelopment Authority of the City of Allentown (herein the "Respondent") filed its Declaration of Taking on January 28, 1999 in the court of common pleas of Lehigh County, Pennsylvania and filed a plan showing the condemned property in the Office of the Recorder of Deeds of Lehigh County, Allentown, Pennsylvania on the same date, for the property located at 235 North Fifth Street, Allentown, Pennsylvania (herein the "Condemned Property") owned by Joe Larry Thorpe and Linda D. Thorpe, husband and wife, (herein the "Petitioners"). Respondent duly served the Petitioners by personal service through the Lehigh County Sheriff's Department with the Declaration of Taking on January 29, 1999 pursuant to the Pennsylvania Eminent Domain Code, 1964, Sp.Sess., June 22, P.L. 84, art. IV, Amended 1969, Dec. 5, P.L. 316, §1, 26 P.S. §1-401 *et seq.*, (Purdons) at 26 P.S. §1-405. Petitioners filed Preliminary Objections on February 19, 1999. Respondent filed its Answer to the Preliminary Objections on March 12, 1999. Respondent served

such Answer and supporting Brief upon the Petitioners pursuant to the Eminent Domain Code. A status conference regarding this matter was held before the Honorable Judge Lawrence J. Brenner of the Lehigh County court of common pleas on March 15, 1999. By court Order, dated March 16, 1999, an evidentiary hearing on the Petitioners' Preliminary Objections was scheduled for April 7, 1999. At the date and time for hearing, April 7, 1999, counsel for Petitioners, Richard J. Orloski, Esquire and Orloski, Hinga & Pandaleon, filed a motion to withdraw as counsel for the Petitioners, Joe Thorpe and Linda D. Thorpe. Petitioners did not file any objection to this motion. After a hearing thereon, the Honorable Judge Lawrence J. Brenner issued a court Order, dated April 7, 1999, approving the withdrawal of Richard J. Orloski, Esquire and Orloski, Hinga & Pandaleon as counsel for the Petitioners and further Ordered that the evidentiary hearing on Petitioners' Preliminary Objections be continued to April 16, 1999.

On the afternoon of April 14, 1999, the Petitioners improperly served subpoenas on the Respondent, the City of Allentown, the Sacred Heart Hospital and the Morning Call, Inc., a local newspaper of general circulation, purporting to command the attendance of certain witnesses and the production of documents relating to the evidentiary hearing scheduled for 9:30 a.m. on Friday, April 16, 1999. Motions to Quash were filed by the Respondent, the City of Allentown, the Sacred Heart Hospital and the Morning Call, Inc. On April 15, 1999 upon consideration of the Motions to Quash filed by the above-named entities, and after hearing thereon, the Honorable Judge Lawrence J. Brenner entered various

Orders for the production of documents, attendance of certain witnesses at the evidentiary hearing and also entered certain protective Orders relating to the Petitioners' Subpoenas, which were determined to be overbroad and improperly served in that personal service was not made on former employees of the various entities.

An evidentiary hearing regarding the Petitioners' Preliminary Objections was held before the Honorable Lawrence J. Brenner on April 16 and 19, 1999. The court of common pleas of Lehigh County by its Order of June 1, 1999, overruled the Petitioners' Preliminary Objections and found that the Respondent, in conjunction with the Allentown City Planning Commission and the Council of the City of Allentown, prior to the filing of this Declaration of Taking for the subject property, conducted the necessary surveys and evaluations, prepared the proper reports and analysis, and further followed the proper procedural steps, including various public hearings, mandated by the Urban Redevelopment Law, 1945 May 24, P.L. 991, 35 Pa. C.S.A. § 1701 *et seq.* (herein the "URL"). (Appendix B of Petition @ pp. 4a-17a, in Opinion of the Honorable Lawrence J. Brenner of the Court of Common Pleas of Lehigh County, Pennsylvania). Specifically, a blight survey was found to be conducted in the mid-1990's and the first public hearing on the blight certification was found to have occurred on February 18, 1998. Further, the blight certification was found to have occurred on or about April 14, 1998. (Appendix B of Petition @ pp. 4a-17a; in Opinion of the Honorable Lawrence J. Brenner of the Court of Common Pleas of Lehigh County). The Honorable Lawrence J. Brenner found that

the Respondent, along with the other government entities, to wit: the Allentown City Planning Commission and the Council of the City of Allentown did not act arbitrarily, capriciously, in bad faith or fraudulently in the condemnation, but instead were fulfilling the public purpose of rehabilitation of blighted area by providing an urgently needed primary health care facility. (Appendix B of Petition @ p. 28a; in Opinion of the Honorable Lawrence J. Brenner of the Court of Common Pleas of Lehigh County).

The Petitioners then filed an appeal to the commonwealth court of Pennsylvania at Docket No. 1595 C.D. 1999. The commonwealth court by its order of December 21, 1999 affirmed the order of June 1, 1999 of the court of common pleas of Lehigh County overruling Petitioners' Preliminary Objections. The commonwealth court specifically stated that it paged through the voluminous record and found no support for Petitioners' contention that the trial court abused its discretion in not allowing discovery and by ignoring important evidence. Further, the commonwealth court went on to provide that the Petitioners failed to point to disputed factual issues and failed to establish what evidence they were precluded from introducing into court. Finally, the commonwealth court provides that since the Petitioners failed to develop properly their argument that the trial court misapplied the law and the court could not act as an advocate, this argument was not reviewed since it was not properly briefed. (Appendix C of Petition @ p. 33a; Opinion of the Honorable James Garner Colins of the Commonwealth court of Pennsylvania).

On January 14, 2000, Petitioners then filed a petition for allowance of appeal to the Pennsylvania supreme court. The supreme court of Pennsylvania by order dated August 30, 2000, denied the petition for allowance of appeal. This Petition to the Supreme Court of the United States then followed.

Facts

The Redevelopment Authority by Resolution duly adopted on December 8, 1998, deemed it necessary to accomplish the public purposes of the URL contained in the duly adopted Redevelopment Proposal to acquire the property owned by the Petitioners located at 235 North Fifth Street, City of Allentown, Lehigh County, Pennsylvania, at the earliest practicable date and through the power of eminent domain, if necessary. On January 28, 1999, the Redevelopment Authority filed its Declaration of Taking condemning the Condemned Property of the Petitioners.

By way of additional information in order to specifically refute Petitioners' various allegations of fraudulent misrepresentation, threats, extortion, agreements to pay $300,000.00 in exchange for exercising the power of eminent domain, blight certification based on minor code violations and schemes to defraud the Petitioners, the following additional factual history developed at the evidentiary hearing and contained within the trial record is presented:

The Sacred Heart Hospital received a gift of real property located at 448 Chew Street, Allentown, Lehigh County, PA, from Donald B. Hoffman on April 3, 1973,

which is located approximately one city block more or less from the pertinent Petitioners' property. (R. @ p. 613). Thereafter, a sole property located at 450 Chew Street, Allentown, Lehigh County, PA was purchased on July 20, 1982 by the Sacred Heart Hospital. Twenty-seven other properties in and around Chew Street, Allentown, Lehigh County, PA, were acquired by Sacred Heart Hospital and were purchased on June 30, 1989 and thereafter. (R. @ pp. 613, 614). These real estate purchases by the Sacred Heart Hospital are of little consequence to these proceedings and this Respondent. This condemnation and its proceedings, deal with the actions of this Respondent and its authority under the URL with regard to blight and its removal. The acquisition of real property within the blighted area by the Sacred Heart Hospital prior to and after the blight certification, and Sacred Heart Hospital's willingness to develop this blighted area support the Respondent's decisions of how and who to develop this area as encompassed by its Redevelopment Proposal. (Appendix B of Petition @ pp. 4a-17a; in Opinion of the Honorable Lawrence J. Brenner of the Court of Common Pleas of Lehigh County).

The HUD grant and a later state grant referenced by the Petitioners were not obtained by fraudulent misrepresentation. The Petitioners' statement to this affect is without any evidentiary support whatsoever and represents a mere unsubstantiated allegation. Petitioners did not present any evidence whatsoever at the evidentiary hearing in support of these allegations. Petitioners have previously proffered in their submissions to the Pennsylvania courts that the fraudulent misrepresentation within the HUD application to be as follows: the HUD application

contains a statement that, "(d)ue to the limited availability of off-street parking and to eliminate the potential for traffic congestion, the Center will include a four level 400 space parking deck", (R. @ p. 569), and since the Redevelopment Plan provides for use of Petitioners' property as a special-purposes parking area for the elderly, handicap, minors and pregnant women, such is inconsistent with the 400 space parking deck presented in the HUD application and therefore encompasses fraud. Two parking lots with differing purposes simply is not inconsistent and does not amount to fraudulent misrepresentation. Further, testimony at the evidentiary hearing established the existence of the 400 space parking deck (R. @ 570). Additionally, the Petitioners proffered at the evidentiary hearing that a further fraudulent misrepresentation in the HUD application included a statement that the Sacred Heart Hospital was the only hospital in Allentown. (R. @ 571). In fact, the HUD grant application did not contain a statement that the Sacred Heart Hospital was the only hospital in Allentown, but instead stated that, "(d)ue to its location, Sacred Heart Hospital bears almost the entire burden of treating the City's elderly, minority and low-income populations . . . (illustrating) Sacred Heart's unique status as the only community hospital in the City . . . ." (R. @ 572). Testimony at the evidentiary hearing regarding the services provided by Sacred Heart Hospital located in the inner city and as compared to the services provided by the other hospitals located in the western part of the city, supports this status of Sacred Heart as the "only community hospital in the city." (R. @ p. 572). Petitioners' allegations of fraudulent

misrepresentation are not supported by a scintilla of evidence, but are contradicted by a quantum of evidence. Finally, Petitioners' statement in footnote 1 to the Petition that there was an ongoing criminal investigation by the federal government regarding the HUD grant prior to the Respondent's filing of its Declaration of Taking is an inaccurate construction. Specifically, Petitioners made allegations to HUD, that the above grant was obtained by fraudulent misrepresentation. As a consequence, an investigation of these allegations ensued. The governmental entities and their representatives involved in the redevelopment activity were interviewed. No actions have been taken by HUD or any other federal governmental entity as a consequence of the Petitioners' allegations and HUD's investigation into the allegations.

Further, Petitioners allege a third party, the Sacred Heart Hospital, threatened that they would seek the use of eminent domain. It should be noted that these allegations are not allegations about this Respondent, but a third party, and therefore should not properly be considered in this matter without any showing that the third party had the authority to act on behalf of this Respondent or that this Respondent was the agent of the third party. Such a showing was not made in the evidentiary hearing. In any event, the evidence presented at the evidentiary hearing does not support the Petitioners' averment that the Sacred Heart Hospital threatened the Petitioners it would seek the use of the power of eminent domain in July of 1996. Rather, a letter of July 1996 from the Sacred Heart Hospital to the Petitioners, which was entered into evidence at the hearing before the Lehigh County court of common pleas, presented an offer to

purchase the subject real estate and nothing else. There is no mention whatsoever of the use of eminent domain by the Sacred Heart Hospital. In fact, any statement by the Sacred Heart Hospital as to the use of the power of eminent domain would be ludicrous, since it does not have this governmental power. (R. @ p. 615).

Petitioners allege that the Sacred Heart Hospital agreed to pay the Respondent $300,000.00 to use its power of eminent domain to take Petitioners' property. Observe that the Petitioners have never provided any factual support for this assertion in any of the court proceedings or appeals below. Further, although the assertion itself simply defies all logic, the Petitioners never explain why the Sacred Heart Hospital would be willing to pay the Respondent $300,000.00 for the use of its power of eminent domain, which is an amount nearly six times the highest appraisal value for Petitioners' property, while at the same time offering a devalued price to the Petitioners. The Respondent did not receive $300,000.00 for the use of its power of eminent domain to acquire Petitioners' property. By way of further information, the court of common pleas of Lehigh County, Pennsylvania found that the Sacred Heart Hospital, as redeveloper, had agreed to indemnify the Respondent for its part in the redevelopment of areas surrounding the Sacred Heart Hospital. The lower court has found that this agreement between the Sacred Heart Hospital and the Respondent regarding indemnification of the Respondent by the Sacred Heart Hospital is not indicative or representative of bad faith or collusion. Rather, the lower court noted that the Pennsylvania supreme court has held that such indemnification agreements are not per se

improper.[1] (Appendix B of the Petition @ footnote 11 on p. 28a; in Opinion of the Honorable Lawrence J. Brenner of the Court of Common Pleas of Lehigh County).

Finally, the Petitioners allege that the City of Allentown and the Sacred Heart Hospital agreed by city ordinance to let the Petitioners' property alone, but thereafter as part of a scheme to defraud the Petitioners changed their minds. Initially, note that Petitioners' allegations do not involve actions of this Respondent and therefore should not properly be considered in this matter without any showing that the third party had the authority to act on behalf of this Respondent or that this Respondent was the agent of the third party. Such a showing was not made by the Petitioners in any proceeding regarding this matter in the lower courts. In any event, Petitioners attempted to provide evidence at the evidentiary hearing regarding a zoning ordinance to vacate a public street which ordinance also provided for alternate access to the Petitioners' property. Petitioners' characterization of this zoning ordinance as an agreement to leave their building alone is simply without any factual basis. The public record provides that the Sacred Heart Hospital agreed at a zoning hearing to allow Petitioners to gain access to their property by crossing the Hospital property.

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[1] Citing, *In the Matter of the Condemnation by the Township of Upper St. Clair v. Fryer*, 138 Pa. Cmwlth. 321, 324, 587 A.2d 907, 909 (1991). *See also, In re Condemnation of Land of Heim*, 151 Pa. Cmwlth. 438, 446-448, 617 A.2d 74, 78-79, *appeal denied* 535 Pa. 625, 629 A.2d 1385 (1992); *Washington Park, Inc. Appeal*, 425 Pa. 349, 356-357, 229 A.2d 1, 4-5 (1967).

REASONS FOR DENYING THE WRIT

In addition to numerous departures from what the Rules of the Supreme Court of the United States require of Petitions for Certiorari, the Petition here utterly fails to set forth any compelling reason consistent with the 28 U.S.C.A. U.S.Sup.Ct. Rule 10, suggesting some aspect of the decision of commonwealth court of Pennsylvania that might merit the attention of this Supreme Court of the United States. Not only is the opinion of the commonwealth court of Pennsylvania soundly reasoned, faithful to the teachings of the Supreme Court in analogous cases, and solidly grounded in the record, the Petition makes no attempt whatsoever to point to any decision of any federal court of appeals or any state court of last resort with which the underpinnings of the ruling below, or their application in this case, might be characterized as inconsistent. Further, the Pennsylvania supreme court denied the Petitioner's application for allocator, finding that there was not a single issue of immediate public importance justifying extraordinary jurisdiction of the Pennsylvania supreme court under 42 Pa. Con.Stat.Ann. §726 (Purdon 1978).

I. THE PETITION DOES NOT RAISE AN ISSUE MERITING REVIEW IN THE SUPREME COURT OF THE UNITED STATES THROUGH ITS ASSERTION THAT THE PENNSYLVANIA EMINENT DOMAIN CODE DOES NOT PROVIDE A CONDEMNEE WITH AN OPPORTUNITY TO DEFEND HIS/HER PROPERTY INTERESTS IN ACCORD WITH THE DUE PROCESS CLAUSE OF THE UNITED STATES CONSTITUTION, WHEN THE PENNSYLVANIA EMINENT DOMAIN CODE CONTAINS SPECIFIC PROVISIONS REGARDING NOTICE TO A CONDEMNEE UPON THE FILING OF A DECLARATION OF TAKING AND PROCEDURAL PROVISIONS BY WHICH A CONDEMNEE MAY OBJECT TO THE TAKING AND RECEIVE JUDICIAL REVIEW OF SUCH OBJECTIONS

The Eminent Domain Code, adequately protects a property owner's procedural and substantive due process rights. The Pennsylvania Eminent Domain Code contains the following very specific requirements regarding initiation of a condemnation proceedings:

> §1-402. Condemnation; passage of title; Declaration of Taking (a) Condemnation, under the power of condemnation given by law to a condemnor, which shall not be enlarged or diminished hereby, shall be effected only by the filing in court of a Declaration of Taking, with such security as may be required under section 403(a), and thereupon the title which the condemnor acquires in the property condemned shall pass to the condemnor on the date of such filing, and the condemnor shall be entitled to possession as provided in section 407.
>
> (b) The Declaration of Taking shall be in writing and executed by the condemnor, shall be

captioned as a proceeding in rem, and shall contain the following:

(1) The name and address of the condemnor.

(2) A specific reference to the statute, article and section thereof under which the condemnation is authorized.

(3) A specific reference to the action, whether by ordinance, resolution or otherwise, by which the Declaration of Taking was authorized, including the date when such action was taken, and the place where the record thereof may be examined.

(4) A brief description of the purpose of the condemnation.

(5) A description of the property condemned sufficient for the identification thereof, specifying the city, borough, township or town and the county or counties wherein the property taken is located, a reference to the place of recording in the office of the recorder of deeds of plans showing the property condemned or a statement that plans showing the property condemned are on the same day being lodged for record or filed in the office of the recorder of deeds in such county in accordance with section 404 of this act.

(6) A statement of the nature of the title acquired, if any.

(7) A statement specifying where a plan showing the condemned property may be inspected in the county in which the property taken is located.

> (8) A statement of how just compensation has been made or secured.
>
> . . .

26 P.S. §1-402 (1969).

Section 1-402 of the Pennsylvania Eminent Domain Code surely passes constitutional muster in that it requires a condemnor to provide specific details about the taking, the property affected, and its authority to commence the taking.

Additionally, the Pennsylvania Eminent Domain Code provides for notice to the condemnee as follows:

> §1-405. Notice to condemnee (a) Within thirty days after the filing of the Declaration of Taking, the condemnor shall give written notice of the filing to the condemnee.
>
> (b) The notice shall be served within or without the Commonwealth, by any competent adult, in the same manner as a complaint or writ of summons in assumpsit, or by certified or registered mail, to the last known address of the condemnee. If service cannot be made in the manner as provided, then service shall be made by posting a copy of the notice upon the most public part of the property and by publication of a copy of the notice omitting the plot plan required by subsection (c)(8), one time each in one newspaper of general circulation and the legal journal, if any, published in the county.
>
> (c) The notice to be given the condemnee shall state:
>
> . . . (For 1-11reference the information contained in §1-402)

> (12) A statement that if the condemnee wishes to challenge the power or the right of the condemnor to appropriate the condemned property, the sufficiency of the security, the procedure followed by the condemnor or the Declaration of Taking, he shall file Preliminary Objections within thirty days after being served with notice of condemnation.
>
> . . .

26 P.S. §1-405

Section 1-405 of the Pennsylvania Eminent Domain Code ensures that a property owner will receive adequate notice upon the filing of a Declaration of Taking, which notice is consistent with the procedural due process rights established by the Fourteenth Amendment to the United States Constitution as interpreted by this Supreme Court. *North Laramie Land Co. v. Hoffman*, 268 U.S. 276, 45 S.Ct. 491 (1925), as cited by the Petitioners provides that statutes providing for condemnation of land may provide proceedings summary in character and for only indirect notice thereof.

Further, note that §1-404 of the Eminent Domain Code, 26 P.S. §1-404, provides for the recording of notice of condemnation in the Office of the Recorder of Deeds of the county in which the property is located.

Not only does the Pennsylvania Eminent Domain Code provide for adequate notice to a condemnee upon the filing of a Declaration of Taking that comports with the procedural due process rights as established by this Supreme Court, but the Pennsylvania Eminent Domain

Code also provides the condemnee with an opportunity to be heard, to wit:

> §1-406. Preliminary Objections (a) Within thirty days after being served with notice of condemnation, the condemnee may file Preliminary Objections to the Declaration of Taking. The court upon cause shown may extend the time for filing Preliminary Objections. Preliminary Objections shall be limited to and shall be the exclusive method of challenging (1) the power or right of the condemnor to appropriate the condemned property unless the same has been previously adjudicated; (2) the sufficiency of the security; (3) any other procedure followed by the condemnor; or (4) the Declaration of Taking. Failure to raise these matters by Preliminary Objections shall constitute a waiver thereof.
>
> . . .
>
> (e) The court shall determine promptly all Preliminary Objections and make such preliminary and final orders and decrees as justice shall require, including the revesting of title. If Preliminary Objections are finally sustained, which have the effect of finally terminating the condemnation, the condemnee shall be entitled to damages as if the condemnation had been revoked under section 408, to be assessed as therein provided. If an issue of fact is raised, the court shall take evidence by depositions or otherwise. The court may allow amendment or direct the filing of a more specific Declaration of Taking.

26 P.S. §1-406.

Pennsylvania courts have considered §1-406 of the Pennsylvania Eminent Domain Code and have found that, "(i)f a party has filed Preliminary Objections to Declaration of Taking, the trial court may not dismiss those objections without first conducting evidentiary hearing to resolve issues of fact in dispute. . . . Commonwealth Court is unable to properly perform appellate review of challenge to a Declaration of Taking without evidentiary record that is mandated by Eminent Domain Code when issues of fact have been raised. *Appeal of McKonly*, 152 Pa.Cmwlth. 211, 618 A.2d 1169 (1992). Further, the Pennsylvania commonwealth court held in *Appeal of Conway*, 432 A.2d 276, 60 Pa.Cmwlth. 520, (1981) that "(i)n an eminent domain proceeding, the trial court erred in dismissing condemnee's Preliminary Objections challenging redevelopment authority's designation of area as blighted, alleging that authority condemned premises for private not public purpose, and questioning sufficiency of bond attached to Declaration of Taking, without conducting evidentiary hearing." The Pennsylvania commonwealth court in the instant case has reviewed the evidentiary record, which clearly established that the Petitioners had an opportunity to be heard.

Pennsylvania courts have established that, "(d)ue process requires that condemnees be permitted to challenge validity of taking in some forum." *Appeal of Swidzinski*, 134 Pa.Cmwlth. 330, 579 A.2d 1352 (1980); Citing U.S. Const. amends. V, XIV. A conflict does not exist between the Pennsylvania courts and the Supreme Court of the United States. In, *Condemnation by the Urban Redevelopment Authority of Pittsburgh*, 527 Pa. 550, 594

A.2d 1375 (1991) the Pennsylvania supreme court, citing U.S. Const. amend. XIV, reviewed the procedures of the URL, Eminent Domain Code and case law and found that they are adequate to protect the property interest of condemnees even at the initial stages of the redevelopment process, thereby satisfying the due process requirement that those affected have an opportunity to voice their objection. *Id.* @ 559. Further, the Pennsylvania supreme court has found that on review in a condemnation proceedings by a redevelopment authority , the "condemnee should be given an opportunity to prove that certification of blight was arbitrary or capricious. . . . That opportunity . . . does not require the lower court to substitute its discretion for that of the legislatively-granted discretion of the Commission." *Simco Stores v. Redevelopment Authority of the City of Philadelphia*, 455 Pa. 438, 442, 317 A.2d 610, 613 (1974). The Petitioners were appropriately given the opportunity by the hearing court to prove the certification of blight was arbitrary or capricious, but they have utterly failed in this regard. The Petitioners present nothing new, nor point to any inconsistency or conflict with the decisions of the supreme court of Pennsylvania or the Supreme Court of the United States, nor point to anything in this instant case which so departs from the usual course of judicial proceedings, that would allow an appeal of this final order of the commonwealth court of Pennsylvania.

Petitioner fails to establish how this Pennsylvania statutory scheme and the decisions of Pennsylvania courts regarding this statute are inconsistent with the Due Process Clause of the Fourteenth Amendment to the United States Constitution or how the lower courts erred

in its application of the statutory scheme to the Petitioners in particular. Petitioner correctly provides that a State prior to taking any action affecting an interest in property must provide notice that is reasonably calculated, under all circumstances, to apprise the interested parties of the pendency of the action, such notice ensuring the opportunity to be heard. *Citing, Mennonite Bd. of Missions v. Adams,* 426 U.S. 791 (1982); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306 (1950). The Pennsylvania Eminent Domain Code absolutely affords condemnees with notice and an opportunity to be heard and the record below establishes that Petitioners absolutely received notice and Petitioners were absolutely heard in compliance with the Pennsylvania Eminent Domain Code. Petitioners' only argument or perhaps observation is that the hearing court promptly scheduled this condemnation matter for an evidentiary hearing 77 days after the Declaration of Taking had been filed. Although, Petitioners are certainly correct in generally observing that certain civil actions are not resolved until years after the initiation of the action, the Petitioners fail to explain why this observation supports their contention that the Pennsylvania Eminent Domain Code either is unconstitutional or was construed in a fashion as to be unconstitutional in their case. Section 1-406(e) of the Pennsylvania Eminent Domain Code mandates that the trial court promptly determine all Preliminary Objections and make such orders as justice requires, including the revesting of title. The Eminent Domain Code requires a prompt determination to ensure, among other things, that if it is determined by the hearing judge that the Preliminary Objections should be granted, that the property owner be

revested with title immediately. Prompt determination of Preliminary Objections can limit the interference with or interruption of property rights. Prompt determination of Preliminary Objections also permits the process for the determination and payment of just compensation to be expedited. This procedure is not violative of the United States Constitution, but is consistent with its protection of interests in property.

II. THE PETITION DOES NOT PROPERLY RAISE THE ISSUE OF WHETHER OR NOT THE PRELIMINARY OBJECTIONS SHOULD HAVE BEEN DISMISSED WHEN THE EVIDENTIARY HEARING ON THE PRELIMINARY OBJECTIONS WAS CONDUCTED BY A JUDGE WITHOUT A JURY, WHEN THE PETITIONER DID NOT REQUEST A JURY AT THE EVIDENTIARY HEARING, THE PETITIONER DID NOT RAISE ANY OBJECTIONS TO THE LACK OF A JURY AT THIS EVIDENTIARY HEARING OR IN ANY OF THEIR FILINGS WITH THE LEHIGH COUNTY COURT OF COMMON PLEAS, THE PETITIONER DID NOT RAISE THIS AS AN ISSUE ON APPEAL TO THE PENNSYLVANIA COMMONWEALTH COURT, AND THE PETITIONER DID NOT RAISE THIS AS AN ISSUE IN THEIR PETITION FOR ALLOWANCE OF APPEAL TO THE PENNSYLVANIA SUPREME COURT

The Petitioners raise the issue of whether or not the evidentiary hearing should have been held before a jury for the first time in this Petition to this Supreme Court of the United States. This Supreme Court has clearly established that an argument raised for the first time to the Supreme Court which has not been raised or resolved in lower courts will not be considered, absent a showing of

unusual circumstances. *Taylor v. Freeland & Kronz*, 503 U.S. 638 (1992); *Lytle v. Household Mfg., Inc.*, 494 U.S. 545 (1990); *City of Springfield Massachusetts v. Kibbe*, 480 U.S. 257, *rehearing denied*, 481 U.S. 1033 (1987); Fed.R.Civ.P. 51 (1993), 28 U.S.C.A. U.S.Sup.Ct. Rule 14.1(a), 24.1(a). Petitioner has not provided any showing of unusual circumstances, and in fact has not addressed the issue that this matter is being raised for the first time in this Petition.

Further, consideration of the substantive issue raised in the Petition of whether or not the presence of a jury is a constitutional requisite at an evidentiary hearing in a condemnation proceeding to determine whether or not the governmental authority has acted properly and within its authority to take property for a public purpose, clearly has been answered in the negative. This Supreme Court has stated that, "when the government initiates formal condemnation procedure, a landowner may question whether the proposed taking is for a public purpose. The landowner who raises this issue, however, seeks not to establish the government's liability for damages, but to prevent the government from taking his property at all. . . . (I)t should be no surprise, then, that the landowner is not entitled to a jury trial on his entitlement to a remedy that sounds not in law but in equity." *City of Monterey v. Del Monte Dunes @ Monterey, Ltd.*, 526 U.S. 687, 713 (1999). Further, "this Court has said 'that there is no constitutional right to a jury in an eminent domain proceeding'." *Id.* @ 711; *citing, U.S. v. W.G. Reynolds*, 397 U.S. 14, 18 (1970); *accord, Bauman v. Ross*, 167 U.S. 548 (1897).

Consider additionally that, "In eminent domain proceedings there is no right under this Amendment (Fourteenth Amendment to the United States Constitution) to a 'trial by jury,' and whether or not the damages of the landowner shall be assessed by a jury is a question of practice and procedure to be determined in accordance with the relevant state law." *U.S. v. 86.6 Acres of Land in Merrimack County,* 44 F.Supp. 495 (N.H. 1942). Consider also the following directly pertinent case in which it was held that a "(h)earing at which evidence is taken in condemnation action by the Department of Transportation (DOT) does not infringe upon landowner's state and federal rights to a jury trial, as one purpose of the hearing is to resolve any preliminary questions as to what land DOT is condemning and any question as to its title before any jury trial on the issue of damages." *Department of Transportation v. Wolfe,* 449 S.E.2d 11, 116 N.C. App. 655 (1994). Finally, consider the long line of cases which clearly provide that the Fourteenth Amendment to the United States Constitution "does not require that eminent domain suits brought by the United Stats for taking property for public use be tried by a jury." *Gila River Ranch, Inc. v. U.S.,* 368 F.2d 354 (Ariz. 1966); *U.S. v. Buhler,* 254 F.2d 876 (Tex. 1958); *City of Honolulu v. U.S.,* 188 F.2d 459 (Hawaii 1951), *certiorari denied,* 342 U.S. 849; *U.S. v. Meyer,* 113 F.2d 387 (Ill. 1940), *certiorari denied,* 311 U.S. 706; *U.S. v. Kennesaw Mountain Battlefield Ass'n,* 99 F.2d 830 (Ga. 1939), *certiorari denied,* 306 U.S. 646; *U.S. v. 2,049.85 Acres of Land, More or Less, in Nuess County, Texas,* 49 F.Supp. 20, (Tex. 1943); *U.S. v. Alexander,* 47 F.Supp. 900 (Va. 1942).

Additionally consider, by analogy Rule 71A(h) (1993) of the Federal Rules of Civil Procedure, which provides that:

> "If the action involves the exercise of the power of eminent domain under the law of the United States, any tribunal specially constituted by an Act of Congress governing the case for the trial of the issue of just compensation shall be the tribunal for determination of that issue, but if there is no such specially constituted tribunal any party may have a trial by jury of the issue of just compensation by filing a demand therefor within the time allowed . . . unless the court in its discretion orders that, because of the character, location or quantity of the property to be condemned, or for other reasons in the interests of justice, the issue of just compensation shall be determined by a commission of three persons appointed by it. . . . Trial of all issues shall otherwise be by the court."

Fed. R. Civ. P. 71A(h).

This Supreme Court, in discussing Rule 71A(h), has clearly indicated that the issue of a jury trial at an eminent domain proceedings is not a Seventh Amendment issue. *U.S. v. W.G. Reynolds*, 397 U.S. 14, 17 (1970). *See also, KLK, Inc. v. U.S. Dept. of Interior*, 35 F.3d. 454 (Alaska 1994); *U.S. v. 158.24 Acres of Land, More or Less, in Bees County Texas*, 515 F.2d. 230 (Tex. 1975). Clearly, even the substantive issue presented in the Petition has been resoundingly determined in a contrary fashion than indicated by the Petitioners.

III. THE PETITION DOES NOT PRESENT AN ISSUE APPROPRIATE FOR A GRANT OF CERTIORARI BY ASSERTING THAT THE PENNSYLVANIA STATE COURTS ERRED IN DISMISSING THE PETITIONERS' PRELIMINARY OBJECTIONS TO THE DECLARATION OF TAKING BECAUSE THE TRIAL COURT PROMPTLY DETERMINED SUCH PRELIMINARY OBJECTIONS AS PROVIDED BY THE PENNSYLVANIA EMINENT DOMAIN CODE

The Petitioners argue that the courts below allowed the Petitioners' Preliminary Objections to be determined in an expeditious fashion which denied them a reasonable opportunity to conduct discovery and obtain a fair hearing in this matter. Upon consideration of contentions regarding the discovery period, the Lehigh County court of common pleas discovery rulings and any impact on the Petitioners' right to a fair hearing, the Pennsylvania commonwealth court found that the "Condemnees fail(ed) to point to disputed factual issues and fail(ed) to establish what evidence they were precluded from introducing into court." (Appendix C of Petition @ p. 33a, in Opinion of the Honorable James Gardner Colins) This Petition to the Supreme Court of the United States simply provides a time table of the proceedings in the Declaration of Taking, and without more, asserts that there was a deprivation of property, with no opportunity to protect constitutionally guaranteed interests. Once again the Petitioners have failed to provide any explanation whatsoever why the notice, the discovery period, and the evidentiary hearing failed to protect their constitutional rights.

Any discovery and evidentiary issues contained within the Petition truly do not merit the review of the Supreme Court of the United States. Discovery and evidentiary issues are matters that traditionally have been found to be within the sound discretion of the trial court. The Petitioners have not established that the courts below have abused their discretion with regard to this discovery matter simply by providing a time table without any reasons, rationale or analysis. The Petitioners merely assert their constitutional rights have been violated without more. Consider that the Petitioners in this matter did not conduct any discovery or make any attempts to conduct discovery until a day and half before the evidentiary hearing. Consider also that the hearing judge entered various orders for production of documents and attendance of witnesses at the evidentiary hearing. All of these determinations by the hearing judge were made pursuant to the various Pennsylvania statues, including the Eminent Domain Code and the Pennsylvania Rules of Civil Procedure. Many items requested in this last minute discovery by the Petitioners were largely part of the public record and were easily obtainable by the Petitioners through requests under Pennsylvania's Right to Know Law. The hearing judge nonetheless issued orders for production of many documents requested by the Petitioners. It is obvious that the hearing judge was cognizant of the Petitioners' property interest and was making every effort to afford the Petitioners' due process of the law in spite of the Petitioners' failures to utilize the discovery methods available to them under Pennsylvania law. Considering these facts pertaining to the discovery process and discovery requests in the proceeding below,

it cannot be said that the trial judge abused the court's discretion so as to deprive the Petitioners of meaningful discovery to protect their property interests. Further, it is equally clear that Petitioners did not provide any analysis or information why the extension of the discovery period would have made the evidentiary hearing more meaningful or more reasonable. The hearing court determined that the discovery period should not be extended, which determination is within its sound discretion. This determination not to extend discovery certainly cannot be determined to be an abuse of discretion in light of the readily available public record and the mandate under the Section 406(a)(e) of the Eminent Domain Code, 26 P.S. §§1-406(a), to proceed "expeditiously" in its rulings and determinations regarding Preliminary Objections to a Declaration of Taking, nor can these mandates of the Pennsylvania Eminent Domain Code be viewed as unconstitutional.

Even if this Supreme Court determines that the discovery and evidentiary matters raised by the Petition should not be evaluated as a discretionary determination within the sound discretion of the hearing court, but instead considers these matters as a constitutional query, such issues do not rise to the level to merit consideration by this Court. This matter presented as a constitutional query has already been determined by this Court as follows: "It has been uniformly held that statutes providing for taxation or condemnation of land may adopt a procedure, summary in character, and that notice of such proceedings may be indirect, provided only that the period of notice of the initiation of proceedings and the method of giving it are reasonably adapted to the nature

of the proceedings and their subject matter and afford to the property owner reasonable opportunity at some stage of the proceedings to protect his property from an arbitrary or unjust appropriation. *Huling v. Kaw Valley Railway & Improvement Co.*, 130 U.S. 559 (1889); *Ballard v. Hunter*, 204 U.S. 241, 262 (Ark. 1907). "The necessity and expediency of the taking of property for public use are legislative questions, no matter who may be charged with their decision, and a hearing thereon is not essential to due process in the sense of the Fourteenth Amendment." *Joslin Co. v. Providence*, 262 U.S. 668, 678 (1923); *Georgia v. Chattanooga*, 264 U.S. 472, 483 (1924). *North Laramie, supra.* As discussed in Argument I herein, the Pennsylvania Eminent Domain Code not only satisfies these constitutional mandates, but exceeds these requirements as is consistent with *Mullane, supra.*

CONCLUSION

For all the foregoing reasons, Respondent respectfully submits that it should be apparent that the Petition sets forth no basis for concluding that the Pennsylvania commonwealth court's decision was incorrectly determined. Further, the Petition does not present an issue that warrants resolution or elaboration by this Honorable Court. Accordingly, the Petition should be denied.

Respectfully submitted,

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